UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WILLIAM J. WHITE, JR., BEVERLY A. WHITE, DONNA DOUGHTY, ROBERT A. DUPUY, CLAY S. ORMSBEE AND WILLIAM P. VACZY, Plaintiffs,	CIVIL ACTION NO. 01-10157-DPW
v.	
BELL ATLANTIC YELLOW PAGES, Defendants.	

MEMORANDUM AND ORDER
March 23, 2004

Six former employees sued their former employer Bell Atlantic Yellow Pages (now Verizon Yellow Pages), claiming, under ERISA and various state law causes of action, alleged misrepresentations in the implementation of certain early retirement plans in 1997 and 1998. Plaintiffs contend that Verizon induced them to accept a 1997 early retirement offer on the basis of misrepresentations to them about the company's plans to offer a retirement incentive plan in the future. They seek to recover the benefits of a more advantageous subsequent offer. Before me is the Company's renewed motion for summary judgment, which I will grant.

I. BACKGROUND

A. The Parties

Plaintiffs William J. White, Jr., Beverly A. White, Donna

Doughty, Robert Dupuy and William Vaczy are residents of Massachusetts. Plaintiff Clay Ormsbee is a resident of Florida. All plaintiffs were formerly employed as sales representatives of the defendant. As sales representatives, the plaintiffs were members of Local 1301 of the Communications Workers of America ("Local 1301," "Union"). In 1997 plaintiffs accepted the Company's retirement incentive offer and left the Company's employ.

Defendant Bell Atlantic Yellow Pages, now known as Verizon Yellow Pages ("Verizon", "Company") is a Delaware corporation engaged in the publication of yellow pages telephone directories.[1] Its principal place of business is in Dallas, Texas. During all the times covered in this suit, the Company employed sales representatives, including plaintiffs, to sell advertising space in the directories.

B. Factual Background

Plaintiffs' ERISA claim relates to the intersection of the Company's collective bargaining agreement with the Union and certain early retirement plans the Company created in 1994 and 1998. Therefore, a discussion of the allegations in this case properly begins with the 1994 collective bargaining agreement ("CBA") that covered all sales representatives, including

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[1]Verizon Yellow Pages is a wholly-owned subsidiary of NYNEX Corporation, which is itself a wholly owned subsidiary of Verizon Communications, Inc.

plaintiffs, through August 1998.

In 1994 the Company and the Union negotiated a Force Adjustment Plan ("FAP") for inclusion in all NYNEX contracts, including the CBA with Local 1301.[2] The FAP was designed to provide the Company with a mechanism to eliminate its "surplus force conditions" by offering a retirement incentive called the "Force Adjustment Plan Special Incentive 6&6 Pension" or "FAP Special Pension." The FAP Special Pension created an incentive for employees to retire early by adding six years to a participant's age and term of service (hence "6&6") for the purpose of calculating the individual's pension benefit under the NYNEX Pension Plan. The effect of the 6&6 provision was to increase significantly the pension benefits to which an individual would be entitled. The FAP Special Pension also contained a Social Security supplement, further increasing the benefits of the package. The NYNEX Pension Plan was amended to include the FAP effective April 3, 1994, the same day that the CBA took effect.

Implementation of the FAP was subject to certain restrictions and requirements. First, the FAP Special Pension could be offered to employees only if the Company officially declared a "surplus condition" in particular jobs and geographic regions. The geographic regions in which the Company could

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[2] NYNEX is the parent corporation of Verizon Yellow Pages Co. See supra note 1.

declare a surplus were denominated as "force adjustment areas" corresponding to the geographic jurisdiction of each bargaining unit; the New England Force Adjustment Area was identical to the territory assigned to Local 1301. The CBA required the Company to declare the surplus condition to the Union in writing, and identify the employees affected by the surplus.

The CBA also declared that the Company would generally only be required to offer the FAP Special Pension to a given employee once, with two exceptions:

> [The Company] has no obligation to offer the retirement incentive to an employee who was previously offered the retirement incentive, was entitled to retire under the offer and chose not to do so, unless the employee rescinded his or her election when given the option or unless, at a later time the employee is in an occupational classification (job title) and Force Adjustment Area within which a surplus condition has been declared.

In other words, although the Company was only obligated to offer the FAP Special Pension to an employee once, a second offer would be required if the employee made a timely rescission[3] of his acceptance of the initial FAP offer, or if the employee failed to accept the initial offer but continued to work in an area that was, or was later declared to be, a surplus area.

In addition, the Company was obligated to offer the FAP

[3]If an offer was oversubscribed, employees who had accepted could, in descending order of seniority, rescind their acceptance, much like passengers volunteering to give up their seats on an overbooked plane. Apparently none of the offers were oversubscribed, so the rescission provision was never invoked.

Special Pension at least once to every employee who was eligible for a service pension, or became eligible by virtue of the 6&6 provision, during the lifetime of the CBA. This offer was mandatory, regardless of whether a surplus condition existed. Apparently, however, after consultations with its clerical union, the Company settled upon a practice whereby, if no surplus actually existed, it would declare the existence of a fictitious "administrative surplus" before offering the FAP Special Pension to eligible individuals. According to plaintiffs, the effect of this administrative surplus was to make the FAP Special Pension generally available, even to those persons who had previously declined an offer.

In 1994 the Company and Union also formed a New England Sales and Productivity Task Force to develop ways to deploy the sales force more effectively. The Task Force discussions led to a September 1996 agreement, known as the "P2000 Agreement," to cap the size of the sales force. In capping the size of the sales force, the P2000 Agreement apparently represented a change of heart for the Company, which had historically resisted the Union's suggestions of a sales force cap. Although the P2000 agreement limited the number of sales representatives soliciting advertising in certain office locations, the Company employed additional sales representatives through 1998 in several special projects related to improving and restructuring the Company's sales process. The P2000 agreement expired on August 8, 1998, the same date as the CBA.

At the time the P2000 Agreement was signed, the sales force exceeded the numerical cap, so reductions in the sales force were required immediately. However, because the CBA contained a provision barring layoffs unless certain specified "external condition[s]" arose, the only way to reduce the force as specified by the P2000 Agreement was by means of voluntary retirement through the FAP incentive procedure.[4]

The procedure for declaring a surplus condition may usefully be described as episodic: at any given point during the life of the CBA, the Company was authorized to take a "snapshot" of its workforce to determine whether a surplus existed in a given area. Upon finding such a surplus and declaring it, in writing, to the Union, the Company could then proceed to make FAP Special Pension offers to eligible individuals in the job classification and area. Eligible individuals were then given 30 days to respond to the offer, at the expiration of which time the surplus condition would lapse along with the FAP offer.

Sometime in the autumn of 1997, Stevan Brinkert, Vice President of Sales (New England), and Joseph Gimilaro, Director of Human Resources/Labor Relations, began discussing the declaration of a surplus condition in the New England area. The

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[4] "External conditions" included such things as "market conditions, leaving lines of business or regulatory matters." No events qualifying as external conditions occurred during the life of the CBA.

Company also discussed the offer with the Union around this time. As a result of these discussions, on November 5, 1997 the Company declared a surplus condition and offered the FAP Special Pension to eligible sales representatives, including plaintiffs.

On November 6, 1997, Howard Hayman, the Company's Vice President of Human Resources, Labor Relations and Quality, sent a memorandum to the individuals who had been offered the FAP Special Pension, including plaintiffs. The memo stated that the November 5 offer was the only offer under the FAP which these individuals would receive before the expiration of the CBA on August 8, 1998. During the rest of the lifetime of the CBA, the memo explained, the Company intended to offer the FAP only to those "pension-eligible sales reps" who had not previously received the offer. In other words, the memo stated that the Company had no intention of declaring another surplus force condition before the CPA expired, and the only future offers of the FAP would be to those who would become pension eligible for the first time between November 5, 1997 and August 8, 1998.

In this memo, Hayman also acknowledged and attempted to quash a rumor about the possibility that the Company was considering implementing a more generous FAP incentive plan in the coming year. Hayman stated:

> There are currently no formal discussions taking place about the pension plan for advertising sales reps and the Company has no plans to change the plan within the life of the existing contract. If the Company and the Union agree to begin discussions about the pension plan

> between now and the end of the contract, any agreements would be effective after the current contract expires which also includes the expiration of the FAP and its benefits.

Plaintiffs accepted the November 5, 1997 offer and retired from Verizon on December 19, 1997.

In the spring of 1998, the Company and the Union began preliminary negotiations concerning the 1998 CBA. One topic of discussion was a further reduction in the size of the sales force, and the rechannelling of accounts from higher cost servicing, such as premises sales, to lower cost means, such as telemarketing sales. At approximately the same time, the Company determined it had less need for the so-called reengineering and special projects it had previously undertaken. The Company also closed sales offices in Keene, New Hampshire and Bangor, Maine at this time.

Apparently as a result of the discussions with the Union and the closing of the two sales offices, the Company decided to again offer the FAP Special Pension to eligible sales representatives on June 15, 1998. The Union participated in discussions regarding the offer and urged the Company as an added retirement incentive to advance the effective date of a previously agreed-upon five percent pension band increase that had been scheduled to take effect before the CBA expired. The Company agreed to add this incentive, and on June 8, 1998 Hayman sent a memo to all pension-eligible sales representatives stating that, due to a further need to reduce the sales force, the Company would make a final offer of the FAP incentive on June 15, 1998.

In his June 8 letter, Hayman stated:

> On November 6th of last year I sent you a memo indicating that, after the November 5, 1997 early retirement offer, the Company had no plans to offer the retirement incentive to all pension-eligible sales reps. again. Because of P2000 force sizing considerations, sales office consolidations and the need to re-channel the market to more cost effectively reach our customers, the Company now has a further need to reduce the number of sales representatives. On June 15, 1998 you will receive an early retirement incentive offer. The Company and the Union have agreed that this offer will be the final offer of the 6&6 early retirement incentive.

As he did in the November 6, 1997 memo, Hayman attempted in the June letter to dispel certain rumors to the effect that the Union and the Company were negotiating the extension of the 6&6 plan beyond the expiration of the CBA. Responding to this rumor, Hayman stated "Any future extension decisions, if any, will not apply to your Union Local. The force conditions under which the Company may seek such an extension simply do not exist in the Advertising Sales Rep work group."

Hayman also attempted to respond to a rumor that the negotiations might also produce a "new enhanced" method of calculating pensions. Hayman acknowledged that "there are currently discussions underway regarding the sales rep pension calculation." However, he continued, "any changes that are subsequently agreed upon will not result in a pension that will exceed this last 6 & 6 early retirement incentive." Under the terms of the FAP as incorporated into the CBA, the June 15, 1998 offer satisfied the requirement that the Company make the FAP offer to all sales representatives who became eligible for the FAP during the period covered by the agreement.

C. Procedural History

On January 25, 2001 plaintiffs filed a four-count complaint against the Company claiming that the Company had misrepresented its future plans for offering retirement incentive packages and seeking to recover benefits allegedly denied them by virtue of their acceptance of an earlier version of the plan that did not include the pension band increase. Count I of the complaint alleged violations of the Company's fiduciary duties under ERISA, 29 U.S.C. § 1104(a) et seq. Counts II-IV alleged violations of state common-law rights: breach of the covenant of good faith and fair dealing, promissory estoppel, and equitable estoppel. On May 3, 2001 plaintiffs voluntarily dismissed their state law claims in Counts II-IV without prejudice, leaving only their ERISA claim.

On July 5, 2002 Verizon moved for summary judgment. I conducted a hearing on October 30, 2002, and, from the bench, granted partial summary judgment in favor of Verizon to the extent that plaintiffs's ERISA claim fell under Vartanian v. Monsanto Co., 131 F.3d 264 (1st Cir. 1997), and took the remainder of the motion under advisement. That same day, I issued a scheduling order requiring the parties to brief the question of whether ERISA applied to the case, and permitting plaintiffs to file an amended complaint to include state law claims. On December 23, 2002 plaintiffs filed an amended complaint pleading only state law claims, and both parties filed briefs addressing whether ERISA applies.

After various intermediate developments, plaintiffs requested an internal review of their pension claims with the Verizon Claims Review Unit and then the Verizon Claims Review Committee, both of which denied their claims. On September 30, 2003 I issued a scheduling order requiring plaintiffs to file a further amended complaint, and permitting Verizon to respond via a motion for summary judgment in lieu of an answer. Plaintiffs filed a Further Amended Complaint on October 9, 2003. Summary judgment memoranda followed shortly thereafter, and on March 17, 2004 I conducted a second summary judgment hearing. This Memorandum will provide a full explanation for my allowance of Verizon's motion for summary judgment.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when "the pleadings, affidavits, admissions, answers to interrogatories, and other materials, viewed in the light most favorable to the nonmoving party, reveal no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Bacou Dalloz USA, Inc. v. Continental Polymers, Inc., 344 F.3d 22, 26 (1st Cir. 2003); Fed. R. Civ. P. 56. A party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995), cert. denied, 515 U.S. 1103 (1995). Once the movant has made such a showing, the nonmovant must point to specific facts demonstrating that there is, indeed, a trialworthy issue. Id.

A fact is "material" if it has the "potential to affect the outcome of the suit under the applicable law." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000), and a "genuine" issue is one supported by such evidence that "a 'reasonable jury, drawing favorable inferences,' could resolve it in favor of the nonmoving party." Triangle Trading Co., Inc. v. Robroy Indus., Inc., 200 F.3d 1, 2 (1st Cir. 1999) (quoting Smith v. F.W. Morse & Co., Inc., 76 F.3d 413, 427 (1st Cir. 1996)). "[C]onclusory allegations, improbable inferences, and unsupported speculation," are insufficient to establish a genuine dispute of fact. Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

B. Analysis

Analysis of Verizon's motion must begin with a rough breakdown of precisely what plaintiffs allege. Initially, plaintiffs argued that the November 6, 1997 memo breached Verizon's fiduciary duty under ERISA because it misrepresented that Verizon had no future plans to make a second offer of the FAP incentive when in fact such plans were already under serious consideration. I previously granted partial summary judgment on the plaintiffs' "serious consideration" claim under Vartanian v. Monsanto Co., 131 F.3d 264 (1st Cir. 1997). Under Vartanian, an employer has "a fiduciary duty not to mislead [participants] as to the prospective adoption of a plan under serious consideration." 131 F.3d at 268 (internal quotation marks omitted). "Serious consideration" occurs when "'(1) a specific proposal (2) is being discussed for purposes of implementation (3) by senior management with the authority to implement that change.'" Id. at 270 (quoting Fischer v. Philadelphia Elec. Co., 96 F.3d 1533, 1539 (3d Cir. 1996), cert. denied, 520 U.S. 1116 (1997)). I found that plaintiffs had not advanced sufficient facts upon which a reasonable juror could find that, in November 1997, Verizon was seriously considering extending the final 1998 FAP Special Pension offer to employees who had declined previous offers.

Plaintiffs later developed the argument that the FAP, by its express terms, required Verizon to offer the FAP Special Pension to all eligible employees before the conclusion of the 1994 CBA; that the only mechanism for making this mandatory offer was to declare a surplus, even if there was in fact no surplus; and that this fictitious surplus declaration would make all pension-eligible employees, even those who had previously declined the FAP Special Pension offer, eligible for the incentive. This is a distinct argument from the Vartanian claim, because it does not rely on Verizon executives' intent or serious consideration regarding future offerings, but rather asserts an affirmative misrepresentation of what the FAP actually meant in 1997 (indeed, in 1994).

Plaintiffs also present two slight variations on this argument. In the first variation they contend that, regardless of what the FAP requires, Verizon's consistent practice since 1994 had been to declare an administrative surplus any time that it wanted to offer the FAP Special Pension to anyone, and since Verizon knew in 1997 that it would need to make at least one more offer, it knew that it would declare an administrative surplus, and therefore offer the FAP Special Pension again, even to employees who had declined the November 1997 offer. In the second variation they contend that a surplus that Verizon had declared before 1997 was still in effect in 1997, it remained so throughout the life of the CBA, and Verizon knew this would be so in 1997.

In order to analyze any of these theories, I must first determine which law governs. Count I of plaintiffs' complaint alleges a breach of fiduciary duty under ERISA. I first determine whether ERISA applies to this case at all.

1. Count I (ERISA)

Count I, if properly stated, arises under ERISA §§ 404 and 502, which respectively create a prudent person standard of care for ERISA fiduciaries, and allow participants (such as former employees) to sue for violation of that standard of care. See 29 U.S.C. §§ 1104, 1132. However, these provisions only apply to a "plan." Therefore, in order to determine whether plaintiffs have a claim under ERISA, I must first determine whether any document under which they claim a right qualifies as a "plan." If there is no ERISA "plan," there is no ERISA claim.[5]

ERISA defines "plan" as "an employee welfare benefit plan or an employee pension benefit plan" or a plan combining aspects of both. See 29 U.S.C. § 1002(3). Unfortunately, "employee pension benefit plan" is in turn defined tautologically as "any plan, fund, or program . . . that by its express terms or as a result of surrounding circumstances . . . provides retirement income to

[5]Plaintiffs' position on this question has oscillated considerably during the pendency of this litigation. Plaintiffs' original complaint alleged, as Count I, an ERISA breach of fiduciary duty. In May 2001, plaintiffs voluntarily dismissed their state law claims, suggesting that they thought it was only an ERISA case. In opposition to Verizon's first summary judgment motion, plaintiffs asserted that, while the individual FAP offerings were not "plans," the FAP Special Pension was a "plan." However, in their December 23, 2002 memorandum on the applicability of ERISA, plaintiffs argued that neither the FAP nor the FAP Special Pension were "plans." That same day, they filed an Amended Complaint pleading only the state law claims. This would appear to remove ERISA from the case. But plaintiffs' Further Amended Complaint again included the ERISA claim, copied verbatim from the original complaint. In opposition to Verizon's second summary judgment motion, plaintiffs returned to their original position: that, while the individual FAP offerings were not "plans," the FAP Special Pension was.

employees." Id. § 1002(2)(A).

The Supreme Court shed light on this confusing definition in Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987), where it held that an employee benefit package is an ERISA "plan" only if its "provision by nature requires an ongoing administrative program to meet the employer's obligation." The Court explained that this definition would comport with ERISA's key objective of protecting employees from employer abuse of pension programs. Id. at 16.

The First Circuit elaborated on this rule by looking to "the nature and extent of [the] employer's benefit obligations" under the package. Rodowicz v. Mass. Mut. Life Ins. Co., 192 F.3d 162, 170 (1st Cir. 1999) (quoting Belanger v. Wyman-Gordon Co., 71 F.3d 451, 454 (1st Cir. 1995)), modified on other grounds, 195 F.3d 65 (1st Cir. 1999); see O'Connor v. Comm. Gas Co., 251 F.3d 262, 267 (1st Cir. 2001) ("O'Connor II") (explaining that determining what constitutes an ERISA plan most often turns on degree of employer's discretion in administering plan), rev'g O'Connor v. Comm. Gas Co., 85 F. Supp. 2d 49, 52 (D. Mass. 2000) ("O'Connor I"). In Rodowicz, the plaintiff retirees alleged that their employer had failed to inform them that a more favorable retirement package was forthcoming at the time they retired, and because of this failure they lost benefits that they would have received had they delayed retirement. 192 F.3d at 165. The plaintiffs alleged violations of ERISA and misrepresentation under state law. Id. The Rodowicz court held that a one-time lump-sum severance bonus to all employees that did not require much administrative burden or expense, and did not require the employer to make a long term financial commitment, did not satisfy the Fort Halifax standard for ERISA plans. 192 F.3d at 171; see also O'Connor II, 251 F.3d at 267-268; Belanger, 71 F.3d at 455.

By contrast, the First Circuit held that a severance plan required by the Massachusetts "tin parachute statute" was an ERISA plan. Simas v. Quaker Fabric Corp., 6 F.3d 849 (1st Cir. 1993). The statute authorized severance pay for employees who lost their jobs within twenty-four months of a corporate takeover. Id. at 850. The Simas court determined that an ERISA plan had been created because the statute's protections were triggered separately according to the timing of the employee's termination, which made an ongoing administrative scheme necessary. Id. at 853. Furthermore, the court held that the fact that the plan administrator was required to individually determine the eligibility of each employee based on reference to other state laws demonstrated a sufficient degree of discretion so as to render the severance statute an ERISA plan. Id.

More recently, in O'Connor II the First Circuit rejected the argument that an early retirement severance plan similar in some respects to the FAP plan here was an ERISA plan. 251 F.3d at 267. Because of the similarity of the facts and the claims to the instant dispute, the case merits consideration in detail.

The O'Connor plaintiffs were two long-time employees of Commonwealth Gas Co. who were considering retiring when, as part of a corporate restructuring, Commonwealth Gas and Commonwealth Electric agreed to combine their operations. See O'Connor I, 85 F. Supp. 2d at 52. As part of this restructuring, the corporations considered alternatives to reduce their combined work force, including layoffs and early retirement incentives. Id. at 52. The companies considered, but did not adopt, a retirement incentive package that added five years to the age and term of service of employees for the purpose of calculating their pension eligibility. Although this plan was ultimately rejected by management as too expensive, it prompted intense speculation by employees about the companies' intentions. Id. This workplace uncertainty prompted the plaintiffs to repeatedly ask executives in the company's human resources department about the prospect of impending changes to retirement packages. Id. at 52-53. Apparently assured by company management that no changes were pending, the plaintiffs retired. Id.

Approximately four months later, the company announced the institution of a severance package, the "PRP," which would have provided additional benefits to the plaintiffs had they postponed their retirement. Id. at 53. The plaintiffs sued the company for a breach of its fiduciary duty under ERISA, and various alleged violations of federal and state common law. Id. at 51.

Upon a motion for summary judgment, the District Court concluded that the state common law claims must be dismissed and that the PRP was an ERISA plan. Id. at 52.

On appeal, the First Circuit reversed, holding that the PRP early retirement incentive program was not an ERISA plan. O'Connor II, 251 F.3d at 262. The panel applied the analytical framework articulated in Fort Halifax and developed in Rodowicz and held that the PRP benefit package involved no "ongoing administrative scheme that is subject to mismanagement." Id. at 266-67. The PRP was more like "one-shot, take-it-or-leave-it incentive." Id. Even though the early retirement program consisted of several components, such as a severance bonus, educational assistance, and a pension credit, the court found that the scheme did not create ongoing administrative obligations sufficient to create an ERISA plan. Id. at 270. The court determined that the processing of employee applications for the PRP benefit on the basis of years of service was little more than a mechanical exercise in which the risk of employer abuse of the plan was negligible. Id.

Most relevant here, the court rejected the argument that the PRP's pension service credit was a plan. Under the PRP, employees would receive service credit calculated as two-and-a-half weeks for each of the first ten years of service plus two weeks for each additional year, up to a maximum of seventy-eight weeks. Id. at 269. Thus, employees would be treated as if they had worked at the company for up to six-and-a-half years longer than they actually did, enabling them to collect their pension benefits (defined by the pre-existing retirement plan) sooner. Id. The court explained that this credit was not a retirement plan, but simply an algorithmic calculation that mechanically changed eligibility for a pre-existing retirement plan:

> [Defendant's] obligation to pay its employees a pension arose under a different retirement plan (undoubtedly covered by ERISA) that antedated the PRP. The only change made by the PRP to that pre-existing defined pension benefit plan was to start disbursements sooner. Once an employee elected to retire under the PRP, the credit enhancement would simply be added to his accrued time in service. . . . The pension credit, like the severance bonus, was a lump-sum benefit - time instead of cash - that left no discretion to [defendant] in calculating how much sooner retirees who opted for the PRP would begin receiving disbursements from their pensions. As such, it did not implicate ERISA.

Id. at 270.

Based on these precedents, I find that the FAP Special Pension is not an ERISA plan and therefore that the fiduciary duties of ERISA do not attach to the alleged misrepresentations in the November 1997 Hayman memo. Like the package in dispute in O'Connor, the Verizon FAP Special Pension provides a one-time incentive to employees wishing to retire early. See O'Connor II, 251 F.3d at 266-67. Moreover, unlike the severance package in Simas, the Verizon FAP does not create a scheme for individualized discretionary determinations of the eligibility of employees for retirement benefits. See Simas, 6 F.3d at 853-54.

While it is true that Verizon has the option of declaring surplus force conditions, the process by which an employee applies for and receives the FAP Special Pension after a surplus condition has been declared is purely automatic and non-discretionary. Compare Simas, 6 F.3d at 853-54 with O'Connor II, 251 F.3d at 267. Once a surplus has been declared, the process by which an employee becomes eligible for benefits is utterly mechanical, based purely on the timing of birthdays and service anniversaries.[6] Indeed, the FAP itself is best described as simply that portion of the CBA that states when the FAP Special Pension will be offered; the FAP Special Pension, in turn, simply acts as a lump-sum grant of age and service credit that may be plugged into the existing pension plan.

For these reasons, I conclude that neither the FAP Special Pension nor the FAP itself are "plans" under ERISA, and therefore will grant Verizon's motion for summary judgment on Count I.[7]

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[6]The FAP is similarly mechanical in the application of its rescission provision which provides that, in the event of over-subscription, individuals are given the opportunity to rescind their offers in order of their seniority. Analyzing a similar provision, the O'Connor II court stated: "Though a 'years of service' standard necessarily requires individualized determinations . . . such assessments do not implicate ERISA unless they are based on non-mechanical, subjective criteria that could in their application be subject to employer abuse." 251 F.3d at 258 (citations omitted). Nothing in the FAP suggests that the implementation of the early retirement package generally, or its recession provision in particular, would be anything other than a purely objective, even mechanical process.

[7]Because there is complete diversity of citizenship of the parties, this court retains jurisdiction over the remaining state

2. Count III (Promissory Estoppel)

Even if the November 1997 memo's statements concerning future offers were definite enough to constitute a "promise," promissory estoppel does not lie here. Promissory estoppel is a legal claim advanced in lieu of a contract supported by consideration. The plaintiff did something (or refrained from doing something) in reasonable reliance on the defendant's promise to do (or refrain from doing) something in return, and now asks the court to make the defendant do what he promised. Put differently, promissory estoppel "consists simply of a promise that becomes enforceable because of the promisee's reasonable and detrimental reliance." Rooney v. Paul D. Osborne Desk Co., 38 Mass. App. Ct. 82, 83 (1995), rev. denied, 419 Mass. 1110 (1995). The Supreme Judicial Court, which avoids the term "promissory estoppel," has adopted in this setting the Restatement's formulation for option contracts: "'[A]n offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.'" Cataldo Ambulance Serv., Inc. v. City of Chelsea, 426 Mass. 383, 386 (1998) (quoting Loranger Constr. Corp. v. E.F. Hauserman Co., 376 Mass. 757, 760 (1978));

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law claims.

see also Restatement (Second) of Contracts § 87(2) (1981).[8] The SJC has also emphasized that, fundamentally, promissory estoppel is an action to enforce a promise: "an action based on reliance is equivalent to a contract action, and the party bringing such an action must prove all the necessary elements of a contract other than consideration." R.I. Hosp. Trust Nat'l Bank v. Varadian, 419 Mass. 841, 850 (1995).

Plaintiffs' claim simply does not fit into this framework. Assuming arguendo that Verizon's statements in the November 1997 memo constituted a "promise," it was, at most, a promise not to offer the FAP Special Pension again to those who declined it. If the promise had been kept, plaintiffs would not have received the benefits of the later offer; nobody in their position would have. The only way to enforce the promise (and thereby give plaintiffs the benefits of their expectations) would be to deprive their similarly situated co-workers of the later offer. Plaintiffs' fundamental claim -- that Verizon broke a promise by misrepresentation -- sounds in tort, not contract, and is simply

[8]Massachusetts courts also frequently cite the decision of the Appeals Court in Loranger in this setting. That court adopted the standard Restatement definition of promissory estoppel as "(1) a promisor makes a promise which he should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, (2) the promise does induce such action or forbearance, and (3) injustice can be avoided only by enforcement of the promise." Loranger Constr. Corp. v. E.F. Hauserman Co., 6 Mass. App. Ct. 152, 154 (1978), aff'd, 376 Mass. 757 (1978).

not meaningful as a contract claim.

The fact that enforcement of the promise could not possibly give plaintiffs the relief that they request, and that, had the promise actually been kept, they would be in precisely the position they are in now, demonstrates that promissory estoppel is not an appropriate basis for plaintiffs' claims. Because enforcement of the promise would yield no relief, even nominal, for plaintiffs, there is no injustice in refusing to enforce the promise.[9] Therefore, I will grant Verizon's motion for summary judgment as to Count III.

3. Counts II & IV (breach of covenant of good faith and fair dealing, and equitable estoppel)

These two counts, which essentially allege an intentional misrepresentation, can fairly be treated together because they are based on similar factual theories and are subject to the same defenses.[10]

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[9]Indeed, since plaintiffs' promissory estoppel claim is not redressable at law, they have no standing to bring it in this court. "To satisfy Article III standing, parties must show injury-in-fact, causation, and redressability." Maroni v. Pemi-Baker Reg'l Sch. Dist., 346 F.3d 247, 253-54 (1st Cir. 2003).

[10]Verizon raises one defense specific to Count II: that Massachusetts does not imply the covenant of good faith and fair dealing to employees who are covered by a CBA. It is well established in Massachusetts that, if an employee is covered by a CBA that requires good cause for termination, then the employee is not protected by the common law covenant of good faith and fair dealing that is implied in at-will employment. Azzi v. W. Elec. Co., 19 Mass. App. Ct. 406, 410 (1985), rev. denied, 394 Mass. 1103 (1985); Burke v. Raytheon Co., 1993 WL 818702, at *6, 1 Mass. L. Rptr. 364 (Mass. Super. Ct. Nov. 30, 1993); see also

a. LMRA § 301 Preemption

Verizon argues that the plaintiffs' state law claims require interpretation of the CBA and are therefore preempted by the Labor Management Relations Act (LMRA) § 301.[11] Resolution of this preemption defense requires a nuanced analysis of what exactly plaintiffs are alleging. I discern three distinct theories of the case, each leading to the common contention that, in November 1997, Verizon intended that an administrative surplus would be in effect in June 1998 when it made the final CBA-

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Bertrand v. Quincy Mkt. Cold Storage & Warehouse Co., 728 F.2d 568, 571 (1st Cir. 1984); Mulvihill v. Spalding Sports Worldwide, Inc., 184 F. Supp. 2d 99, 103 (D. Mass. 2002) (Ponsor, J.). Two rationales are commonly given. First, the CBA specifies the parties' rights and duties contractually, and therefore replaces the implied common law duties found in at-will employment. See Bertrand, 728 F.2d at 568; Azzi, 19 Mass. App. Ct. at 410. Second, resolution of the claim would require interpretation of the CBA, and therefore the common law covenant, even if it existed, would be preempted by the Labor Management Relations Act. See Mulvihill, 184 F. Supp. 2d at 103; Burke, 1993 WL 818702 at *6.

On the first rationale, plaintiffs' misrepresentation claims are distinguishable because no provision of the CBA directly applies to their claim that Verizon misrepresented its intentions. While plaintiffs had a remedy under the CBA for their argument that, under the terms of the FAP, they were in fact entitled to the second offer, Verizon points to no provision providing a remedy for misrepresentations. The second argument -- that resolution of the claims would require interpretation of the CBA -- applies equally to Count IV (equitable estoppel) and is discussed in the text of this section.

[11] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185.

mandated offer, and that the November 1997 memo's statements that Verizon had no plans to make another offer to those who had received the 1997 offer were therefore misrepresentations.

The differences among plaintiffs' three theories are simply in how plaintiffs get to this conclusion. In plaintiffs' first theory, the FAP by its express terms required a surplus to be declared in order to offer the FAP Special Pension to the pension-eligible employees who had not yet received an offer by August 1998. In their second theory, whatever the CBA required, Verizon had a consistent past practice of using an administrative surplus as a mechanism for making the mandated offer where no actual surplus existed, and Verizon intended in November 1997 to use that mechanism again when it made the final offer. In their third theory, the first surplus that Verizon declared had never been terminated, and was therefore still in effect in November 1997, at which time Verizon intended that it would remain in effect in June 1998.[12]

Verizon argues that all these theories require interpretation of the FAP, which is Article 22 of the CBA, and are therefore preempted by LMRA § 301. As explained below, I find that the "express terms of FAP" and "ongoing surplus" theories are preempted by LMRA § 301, but that the "past

[12]The second and third theories are in some tension with each other, but I understand plaintiffs to allege them in the alternative.

practice" theory is not.

The basis of the preemption defense is that only an action under the LMRA may interpret a CBA:

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles--necessarily uniform throughout the Nation--must be employed to resolve the dispute.

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06 (1988). The First Circuit has explained this principle in further detail:

> A state-law claim can "depend" on the "meaning" of a collective bargaining agreement in two ways. First, a claim so qualifies if it alleges conduct that arguably constitutes a breach of a duty that arises pursuant to a collective bargaining agreement. Second, a claim so qualifies if its resolution arguably hinges upon an interpretation of the collective bargaining agreement. If a state-law claim depends on the meaning of the collective bargaining agreement in either of these ways--that is, under [the] "duty" rubric or under [the] "interpretation" rubric--it is preempted.

Flibotte v. Pa. Truck Lines, Inc., 131 F.3d 21, 26 (1st Cir. 1997). The "interpretation" approach to § 301 preemption derives from Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). There, the plaintiff sued for tort of bad-faith failure to pay disability benefits. The Supreme Court found that resolution of the state law claim would require the court to determine what the disability benefits were supposed to be, and held that § 301 preempts "when resolution of a state-law claim is substantially dependent upon analysis" of the CBA. Id. at 220.

Plaintiffs' "express terms of the FAP" theory alleges that Verizon misrepresented its obligations under Article 22 of the CBA. To the extent that either Count II or Count IV rests on this theory, I find that those claims "arguably hinge[] upon an interpretation of the collective bargaining agreement," Flibotte, 131 F.3d at 26, and are therefore preempted.

Similarly, I find that the "ongoing surplus" argument "arguably hinges upon an interpretation of the collective bargaining agreement." Plaintiffs' basis for this argument is the tentative and uncertain testimony of George Alcott, President of Local 1301, who stated that he did not recall receiving notice from the Company that the initial surplus had been terminated. He concluded that therefore the surplus remained in effect throughout the life of the CBA. Alcott evidently presumes that, under the CBA, a surplus remained in effect indefinitely until specifically terminated; without such a presumption, his conclusion is a non sequitur. I therefore find that the ongoing surplus argument is also preempted.

However, I do not find that the "past practice" theory -- under which plaintiffs allege that, even if the CBA did not require a fictitious declaration of surplus in order to implement the mandatory offer, this was in fact how Verizon always did it before November 1997, and intended then to do it in 1998 -- to be preempted by the LMRA. While the “past practice” theory does make passing reference to the CBA (without which terms such as "surplus" and "FAP" lack definition), it does not "hinge[] upon [its] interpretation," Flibotte, 131 F.3d at 26. "[W]hen the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require" preemption under § 301. Livadas v. Bradshaw, 512 U.S. 107, 124 (1994).

Having established what is preempted by § 301 and what is not, I now turn to the consequences. The CBA required employees to file grievances within thirty days; Verizon argues that this applies to retirees, even if they were no longer working when their grievance arose. Generally, employees represented by a union and covered by a collective bargaining agreement must exhaust union remedies before bringing suit under § 301. Vaca v. Sipes, 386 U.S. 171, 184-88 (1967); Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 294 (1st Cir. 1978). This includes former employees. Merk v. Jewel Cos., 848 F.2d 761, 766 (7th Cir. 1988), cert. denied, 488 U.S. 956 (1988). Grievances relating to the benefits accompanying termination of employment "are not [so] critically unlike other types of grievances" that they exempt the ex-employee from the requirement of pursuing his claims through union process. Republic Steel Corp. v. Maddox, 379 U.S. 650, 656 (1965). On the other hand, William McKelligan, a CWA staff representative, testified that employees who retired under the FAP Special Pension were no longer members of the union and would not be permitted to file grievances, though he did not explain how he reached the latter conclusion.

There are some circumstances under which an employee (whether presently working or not) is not required to exhaust union remedies before pursuing a § 301 action. Exhaustion is not required where exhaustion would be futile, where the union breaches its duty of fair representation, or where union remedies are otherwise inadequate. See Vaca, 386 U.S. at 184-88; Soto Segarra, 581 F.2d at 294-95. Moreover, failure to exhaust is an affirmative defense, and the defendant bears the burden of proving both the existence of an adequate union remedy and the plaintiff's failure to pursue that remedy. Doty v. Sewall, 908 F.2d 1053, 1061 (1st Cir. 1990).

I find that Verizon has met these burdens, and McKelligan's testimony does not raise a genuine dispute of material fact as to whether failure to exhaust is excusable. I therefore find that plaintiffs' failure to exhaust union remedies bars a § 301 action on the "express terms" and "ongoing surplus" theories.[13]

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[13]Even if a § 301 action were proper, however, I would find that neither of the preempted claims would withstand summary judgment as a substantive matter for at least two reasons.

First, it is plain that the FAP did not, by its express terms, require Verizon to declare a surplus in 1998 as a procedural mechanism in order to make the mandatory offer to remaining pension-eligible employees. The FAP provides two circumstances in which Verizon must offer the FAP Special Pension: a surplus, which Verizon could declare essentially whenever it wanted; and a mandatory offer to any pension-eligible

For these reasons, I will grant partial summary judgment to Verizon to the extent that plaintiffs base Counts II and IV on either the theory that the FAP required an administrative surplus to be declared, or that there was an ongoing surplus.

b. No Genuine Dispute of Fact on "Past Practice" Theory

Plaintiffs' remaining theory under both Counts II and IV alleges that Verizon had a consistent past practice (with other locals even if not with Local 1301) of declaring a fictitious administrative surplus as the mechanism for implementing a FAP offer even where there was no actual surplus of employees. Therefore, the November 1997 memo's assurance that Verizon "intend[ed] to only offer the FAP retirement incentive to those pension-eligible sales reps who have not previously received the

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employee sometime during the life of the CBA. Nothing in the FAP says that the second must be accomplished by means of the first. Moreover, plaintiffs' theory would render the rescission provision of Article 22.01(2)(b) a complete nullity, because any employee who did not retire under the 1997 offer -- whether he had declined it, as plaintiffs now wish they had, or accepted, but then rescinded when it became apparent that it was oversubscribed -- would be guaranteed the right to participate in a later offer.

Second, I find that Alcott's hazy recollections and hesitant conclusions do not form a factual basis upon which a reasonable juror could conclude that there was an ongoing surplus condition in New England. Rather, they are "conclusory allegations, improbable inferences, and unsupported speculation" that do not establish a genuine dispute of fact. See Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990).

offer" could constitute a misrepresentation if Verizon intended that the planned offer would, once again, be implemented by a fictitious surplus that would include employees who had declined the November 1997 offer.

Present intent to misrepresent is required under both Counts II and IV. I address the requirements of each claim in turn.

Under the covenant of good faith and fair dealing, "'neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'" AccuSoft Corp. v. Palo, 237 F.3d 31, 45 (1st Cir. 2001) (quoting Druker v. Roland Wm. Jutras Assoc., 370 Mass. 383 (1976)); Nile v. Nile, 432 Mass. 390, 398 (2000) (quoting same).[14] While "[t]here is no requirement that bad faith be shown," plaintiffs must nevertheless show "a lack of good faith," which "may be inferred by evidence that the [defendant's performance of the agreement] was unreasonable under all the circumstances." Nile, 432 Mass. at 398-99. Since I do not find that Verizon's performance of any part of the CBA (including the FAP) was unreasonable under all the circumstances, plaintiffs must affirmatively show a lack of good faith in order to succeed on Count II.

Similarly, equitable estoppel requires a "'representation or conduct amounting to a representation intended to induce a course

[14] I put aside for the moment the question of whether Verizon's actions actually injured the rights of plaintiffs to receive the fruits of the contract, since plaintiffs did, after all, receive the FAP Special Pension to which they were entitled.

of conduct on the part of the person to whom the representation is made.'" Boylston Dev. Group, Inc. v. 22 Boylston St. Corp., 412 Mass. 531, 542 (1992) (quoting Cellucci v. Sun Oil Co., 2 Mass. App. Ct. 722, 728 (1974), aff'd, 368 Mass. 811 (1975)). It differs from promissory estoppel in that, while promissory estoppel involves reliance on a misrepresentation of future intent, equitable estoppel involves reliance on "a misrepresentation of past or present facts." Boylston Dev. Group, 412 Mass. at 543 n.17; accord Masso v. United Parcel Serv. of Am., Inc., 884 F. Supp. 610, 618 (D. Mass. 1995) (Lindsay, J.). Under the "past practice" theory, plaintiffs argue that Verizon's failure to state its past practice was a misrepresentation by omission of past facts and was intended to induce plaintiffs to accept the November 1997 offer, before the pension band increase took effect.

Plaintiffs' problem is evidentiary. There may be a genuine issue of material fact as to whether Verizon's past practice as of November 1997 in dealing with all bargaining units, including Local 1301, was to declare a fictitious administrative surplus in order to make the mandatory FAP offer. Verizon presents a persuasive case that this practice was limited to Local 1302. But even if it were established that this was a widespread and consistent past practice, plaintiffs have presented no evidence whatsoever that this practice was intended for the future, nor that Verizon's failure to mention this history was intended to induce employees to accept the November 1997 offer.

The circumstantial evidence presented -- that the Company had previously used the administrative surplus mechanism; said in November 1997 that it wasn't going to make another offer to those who declined the 1997 offer (implying that it would not use the administrative surplus again); and then extended the June 1998 offer to employees who had declined prior offers, despite what it said in the November 1997 memo -- does not suffice to raise an inference that Verizon intended, in November 1997, to do what it did in June 1998. The seven month interval between the two offers, combined with the supervening (even if not entirely unforeseeable) causes that led to the declaration of an actual (not fictitious) surplus, more than rebut plaintiffs' circumstantial case for intent. Therefore, I find that, to the degree that Counts II and IV depend on Verizon's intent in November 1997, plaintiffs fail to establish an essential element of those claims.

c. Disposition

Counts II and IV could be grounded in three distinct theories. Two of those theories (that the FAP required an administrative surplus to be declared in order to make a FAP Special Pension offer, or that an earlier surplus, having never been terminated, remained in effect) are preempted by LMRA § 301, and cannot be maintained because plaintiffs failed to exhaust union remedies. The remaining theory (that the Company had a past practice of declaring an administrative surplus to make a FAP Special Pension offer), while not preempted, is unsupported by facts sufficient to withstand summary judgment. Because plaintiffs cannot proceed on Counts II or IV based on any of the theories presented, I will grant Verizon's motion for summary judgment on those counts.

IV. CONCLUSION

For the reasons set forth above, Verizon's motion for summary judgment is GRANTED in its entirety.

/s/ Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE